Office - Supreme Court, U.S.
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SEP 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-2404

In the Supreme Court of the United States

OCTOBER TERM, 1982

THE GOLD BONDHOLDERS PROTECTIVE COUNCIL, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that a 1935 statute, 31 U.S.C. 773b, which withdrew in part the consent of the United States to be sued on gold clause securities after January 1, 1936, is unconstitutional as applied to an action brought in 1981 upon a $50 4¼% Gold Bond that matured in 1934.

1. In 1918, pursuant to the Second Liberty Bond Act, ch. 56, 40 Stat. 288, 31 U.S.C. 752 *et seq.*, the United States issued a series of obligations known as the Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938. These bonds contained a "gold clause," which provided that the "principal and interest hereof are payable in United States gold coin of the present standard of value." *Perry* v. *United States*, 294 U.S. 330, 347 (1935). The purpose of such gold clauses was to "afford protection [to bondholders] against loss * * * by setting up a standard or measure of the Government's obligation." *Id.* at 348. However, in 1933 and 1934, in response

to the economic problems caused by the Great Depression, the United States abandoned the gold standard. One part of this change was brought about by the Gold Clause Joint Resolution of June 5, 1933, 31 U.S.C. 463, which declared gold clauses, in both private and public obligations, to be against public policy and void.

This statute was immediately challenged by a holder of a 4¼% Gold Bond of 1933-1938. *Perry* v. *United States, supra.* The holder in *Perry* argued that the Gold Clause Joint Resolution was an unconstitutional attempt to impair the obligation of a contract and he demanded, upon maturity of his bond, payment in gold coin or its equivalent in currency. While a majority agreed with Perry that the Gold Clause Joint Resolution exceeded Congress' powers insofar as it applied to extant government obligations (294 U.S. at 348-354; *id.* at 361-381 (dissenting opinion)), the Court nonetheless dismissed Perry's claim for failing to state a cause of action for actual damages (*id.* at 354-358; *id.* at 358-361 (Stone, J., concurring).[1] The Court observed that Congress had changed the monetary system and that gold was no longer legal tender or a medium of exchange.[2]

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[1]Justice Stone, whose vote was necessary to dispose of the case on this ground, concluded that the Court should not have undertaken to decide whether Congress had exceeded its powers with respect to outstanding obligations. 294 U.S. at 358-361.

[2]The United States officially abandoned the domestic gold standard in 1933-1934. Pursuant to authority granted by the Emergency Banking Relief Act of March 9, 1933 (48 Stat. 2, 12 U.S.C. 248(n)), gold held by private persons in the United States was required to be surrendered to the government. The Gold Reserve Act of 1934 prohibited private ownership of gold and provided for the termination of gold coinage and for the withdrawal from circulation and melting down of existing gold coins. Redemption of any currency of the United States in gold was, and remains, prohibited. 48 Stat. 340, 31 U.S.C. 315b, 408a. The United States was, and remains, prohibited from paying out or delivering any gold coin. 31 U.S.C. 315b.

Consequently, the government's obligation on the gold clause bonds was only to pay their dollar value; if the government so discharged its obligation on Perry's bond, Perry would suffer only nominal, and not actual, damages by the breach of the obligation.

The Court in *Perry* made clear that the United States could, notwithstanding its underlying obligation on the gold clause, assert its sovereign immunity and so defeat a suit for a remedy upon the obligation (294 U.S. at 353-354):

> Congress has not been vested with authority to alter or destroy [the binding quality of the promise of the United States] * * *. The fact that the United States may not be sued without its consent is a matter of procedure which does not affect the legal and binding character of its contracts. While the Congress is under no duty to provide remedies through the courts, the contractual obligation still exists and, despite infirmities of procedure, remains binding upon the conscience of the sovereign.

In his concurring opinion, Justice Stone similarly referred to the "undoubted power of the Government to withdraw the privilege of suit upon its gold clause obligations." *Perry* v. *United States, supra,* 294 U.S. at 360.

In response to Justice Stone's suggestion in *Perry,* Congress passed the Joint Resolution of August 27, 1935, which permitted suits on gold clauses to continue to be brought until January 1, 1936, a period regarded as "ample time for anyone who had any sort of a claim to present his claim." 79 Cong. Rec. 12620 (1935) (remarks of Sen. Fletcher). However, the United States withdrew its consent to be sued after that date on gold clause obligations in amounts exceeding the nominal dollar amount of the bonds. The Joint Resolution, 31 U.S.C. 773b, provides:

Any consent which the United States may have given to the assertion against it of any right, privilege, or power whether by way of suit, counterclaim, set-off, recoupment, or other affirmative action or defense in its own name or in the name of any of its officers, agents, agencies, or instrumentalities in any proceeding of any nature whatsoever (1) upon any gold-clause securities of the United States or for interest thereon, or (2) upon any coin or currency of the United States, or (3) upon any claim or demand arising out of any surrender, requisition, seizure, or acquisition of any such coin or currency or of any gold or silver and involving the effect or validity of any change in the metallic content of the dollar or other regulation of the value of money, is withdrawn: *Provided*, That this section shall not apply to any suit commenced prior to August 27, 1935, or which may be commenced by January 1, 1936, or to any proceeding referred to in this section in which no claim is made for payment or credit in an amount in excess of the face or nominal value in dollars of the securities, coins, or currencies of the United States involved in such proceeding.

2. Petitioner is a holder of a $50 Fourth Liberty Loan 4¼% Gold Bond of 1933-1938, a bond of the same issue as that challenged in *Perry*. Petitioner's bond (No. 17727170) was called for redemption on April 15, 1934. Treasury Department Circular No. 501 (Oct. 12, 1933). However, the bond was not presented for payment at its maturity.[3] On April 2, 1981, 47 years after maturity, petitioner presented the bond for payment, requesting, as did the petitioner in

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[3]Petitioner was not the owner of the bond at its maturity in 1934. Petitioner represented that it purchased the bond from the Numismatic and Antiquarian Service Corporation of America on September 29, 1980, for $529.60

Perry, that payment be made in gold coin or in currency sufficient to purchase a like amount of gold coin (Pet. App. 2a). The Treasury Department returned the bond, declining to consider this submission of the bond as a proper presentation and surrender in light of these conditions.

Petitioner then brought this action in the Court of Claims. The Court of Claims granted the government's motion for summary judgment (Pet. App. 1a-7a; 676 F. 2d 643). Relying upon the Joint Resolution of August 27, 1935, the court held that any claim for payment in excess of the nominal value of the bond was barred by sovereign immunity (Pet. App. 4a-6a).

3. The decision of the Court of Claims is correct. It rests on established principles of sovereign immunity and does not warrant further review.

That the United States may not be sued absent its consent has, from the first, been a "universally received opinion." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 411-412 (1821) (Marshall, C.J.). Accord, *e.g.*, *United States* v. *Testan*, 424 U.S. 392, 399 (1976); *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941). Even if the United States has consented to be sued, this consent may be withdrawn at any time. See *Maricopa County* v. *Valley National Bank*, 318 U.S. 357, 362 (1943); *Lynch* v. *United States*, 292 U.S. 571, 580-582 (1934); *Schillinger* v. *United States*, 155 U.S. 163 (1894). It was on the basis of these well settled principles that the Court in *Perry* recognized that the United States could withdraw absolutely its consent to be sued upon the very obligation at issue here, the gold clause in the Fourth Liberty Loan 4¼% Gold Bonds of 1933-1938. *Perry* v. *United States*, *supra*, 294 U.S. at 354; *id.* at 360 (Stone, J., concurring). Accordingly, petitioner's premise, that "for

every wrong there should be a remedy" (Pet. 6), does not apply to the United States and never has.[4]

Moreover, even if there were merit to petitioner's claim that Congress could not *completely* divest the courts of jurisdiction to hear claims arising from a valid underlying government obligation, this case plainly does not present that issue. The holder of petitioner's bond at its date of maturity—April 15, 1934—was entitled, as was every holder of a Fourth Liberty 4¼% Gold Bond of 1933-1938, to have his claim fully aired in court, as long as the claim was brought prior to January 1, 1936. 31 U.S.C. 773b. Indeed, Congress intended in this statute to insure that "every man who had any sort of a claim, or imagined he had a claim, could bring his suit." 79 Cong. Rec. 12620 (1935) (remarks of Sen. Fletcher).[5]

This Court has observed on many occasions that "[t]here is no question of the power of Congress to define [temporally] the limits of its waiver of sovereign immunity." *Crown Coat Front Co.* v. *United States*, 386 U.S. 503, 520

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[4]Petitioner's reliance (Pet. 6) on Section 4 of the Fourteenth Amendment, which provides in pertinent part that "[t]he validity of the public debt * * * shall not be questioned," is misplaced. The Court in *Perry* expressly concerned itself with the relation of this constitutional provision to the government's obligations under the gold clause. While the Court found the Fourteenth Amendment to have a bearing upon the United States' substantive obligations, the Court nonetheless emphasized that "the United States may not be sued without its consent * * *." 294 U.S. at 354; see *id.* at 360 (Stone, J., concurring).

[5]Senator Fletcher observed that in light of *Perry*, it did not appear that any person could assert a valid claim under any gold clause obligations. 79 Cong. Rec. 12620 (1935). The Joint Resolution was deemed necessary, however, because "it is a nuisance for the Government to be troubled with litigation which might be brought involving cases pestiferous in their nature, without the hope of recovery, and therefore this joint resolution is presented to shut off that sort of contention and to conclude the whole matter." *Ibid.*

(1967); *Finn* v. *United States*, 123 U.S. 227, 232 (1887); *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122, 126 (1869). It is true, of course, that petitioner, having purchased this bond 45 years after the expiration of the limitations period, is unable to take advantage of the jurisdiction that Congress created for judicial consideration of the obligation of the United States under this bond. This merely means, however, that petitioner has purchased a stale law suit. No principle of constitutional law requires Congress to make judicial review available at the behest of *every* person who claims to have an interest in the manner in which the United States discharges one of its obligations. Rational and equitable expectations are fully satisfied if the controversy is of a sort that can be resolved at the behest of some aggrieved party. That is true here, for the holder of the bond at its maturity in 1934 could have obtained judicial review of the issue petitioner seeks to raise.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1982

DOJ-1982-09